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Title: Discursive Silence as a Global Response to Sexual Violence: from Title IX to Truth Commissions

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Abstract: A pattern of personal and political silence in response to sexual violence is evident across societies, despite significant cultural, political, and social differences. Drawing on Foucault's concept of discourse as a tool that can shed light on the hidden workings of historically contingent social systems that produce forms of knowledge and meaning, we argue that the logics that are built into laws governing national responses to sexual violence draw attention to the ways that these logics structure social relations between sexual violence survivors and society, masking some experiences and bringing others to light. Following Marianne Constable's analysis of silence and the limits and possibilities of modern law, the manuscript explores the ways in which strategies of silence in the face of sexual violence might lead to novel approaches for pursuing justice for survivors outside of positivist legal frameworks. We also draw on critical feminist perspectives directing legal scholars to pay careful attention to non-legal discourses in developing analyses and responses to sexual violence. The manuscript develops its central arguments through an examination of two dramatically different cases: a) Title IX as a mechanism for responding to sexual violence on college campuses in the United States; and b) the South African Truth and Reconciliation Commission's efforts to pursue transitional justice vis-à-vis gender and sexual violence in post-apartheid South Africa.

Keywords: discursive silence, sexual violence, limitations of law, Title IX, truth commissions

Word Count: 12,082

*There is, in other words, a silence about who suffers this affliction that further silences women. Silences build atop silences, a city of silence that wars against stories. A host of citizens silencing themselves to be accepted by the silenced. People meeting as caricatures of human beings, offering their silence to each other, their ability to avoid connection. Dams and seawalls built against the stories, which sometimes break through and flood the city. Rebecca Solnit, "A Short History of Silence," in *The Mother of All Questions* (Chicago: Haymarket Books, 2017): 38.*

*So much injustice is reproduced by silence not because people do not recognize injustice, but because they do recognize it. Sara Ahmed, *Living a Feminist Life* (Durham and London: Duke University Press, 2017).*

Introduction

The theme of silence pervades the subject of sexual violence in global society, from sexual assault in everyday life to wartime rape. A pattern of personal and political silence in response to sexual violence is evident in diverse societies across the globe. Silence shapes the reactions of survivors as well as the institutional responses of state and non-state actors. In contemplating silence as an integral feature of global responses to sexual violence, it is critical to recognize that silence is not foremost about gaps or absences. Silence is not the null and the void. Rather, silence is a form of discourse.

Silence as a response to oppression, violence, injustice, and deprivation can perpetuate these harms. In cases involving sexual violence and harassment, survivors often remain silent as a form of self-protection.¹ Breaking silence about sexual violence involves serious risks for individual survivors, including the risk of being re-traumatized during adversarial legal processes, the fear of not being believed, cultural stigma, negative consequences in the workplace, and damage to interpersonal relationships. Due process considerations and concerns about reputational risks also lead Institutions to adopt policies that call for parties involved in complaints about sexual harassment to remain silent. As a result of such risks, silence may protect individual survivors as well as institutions. At the same time, silence reinforces dynamics that perpetuate the prevalence of sexual violence.² In turn, the public silence surrounding issues involving sexual violence and harassment serves as an obstacle to institutional and cultural change. When sexual violence and misconduct are not openly and honestly discussed in the public sphere, there are fewer opportunities to raise awareness in ways that might

¹ Marian Tankin and Annemiek Richters, "Silence as a Coping Strategy: the Case of Refugee Women in the Netherlands from South-Sudan who Experienced Sexual Violence in the Context of War." *Voices of Trauma* (Boston, MA: Springer, 2007): pp. 191-210.

² Sara Ahmed, *Living a Feminist Life* (Durham and London: Duke University Press, 2017), pp. 139-40.

change the public policies, laws and sociocultural norms that govern these issues. Although silence as a response to sexual violence has significant negative dimensions, discursive silence also has the potential to reveal truths about women's embodied experiences and to express power.³

In developing our argument that silence is a form of discourse that responds to sexual violence, we follow Foucault's conception of discourse as "a set of ideas and practices with particular conditions of existence, which are more or less institutionalised, but which may only be partially understood by those that they encompass."⁴ Following Foucault, we use the concept of discourse as a tool that can shed light on some of the hidden workings of historically contingent social systems that produce forms of knowledge and meaning around sexual violence.⁵ Discourse, according to Foucault, produces logics that structure the constitution of social – and global – relations.⁶ In this article, we explore the logics that are built into laws that govern national responses to sexual violence. By using a discursive approach, we argue that these 'legal logics' are not fundamentally objective or separate from society (as positivists might suggest), but instead draw attention to the ways that these logics structure social relations between sexual violence survivors and society, masking some experiences and bringing others to light.

Foucault further suggests that logics reflect an episteme (or a structure of knowledge) that is contingent on the historical period in which they arise. There are three arguments for recognizing discourse as historically contingent: first, discourses are generated within social orders governed by rules and categories that determine which forms of truth, or knowledge, are deemed legitimate or not. Second, because these rules and categories are considered *a priori*, or coming *before* discourse, it becomes possible to claim particular discourses as irrefutable – thus masking its hidden workings, and remodeling discourse as a-historic. Third, the rules and categories of discourse become fixed through discourses' reiteration, fixing meanings of statements or texts to reinforce the political rationality that underpinned its production.⁷

Our central argument follows Foucault's approach to locating discursive practices in their social, political and historic contexts. Specifically, we consider silence as a form of discourse that reflects a set of ideas and practices around sexual violence,

³ While we offer a critique of positivist approaches to legal frameworks, and therefore to concepts like 'truth', we use the term consciously in an effort to recognise women's embodied experiences - or truths – that are too often dismissed as fabrication or construction in the legal and social settings under discussion in this article.

⁴ Stephen Gill, "Globalisation, Market Civilisation, and Disciplinary Neoliberalism," *Millennium: Journal of International Studies* 24: 3 (1995): pp. 339, 402.

⁵ Michel Foucault, *The Archaeology of Knowledge and the Discourse on Language* (New York: Pantheon books, 1969).

⁶ *Ibid.*

⁷ *Ibid.*

and we interrogate the ‘hidden workings’ of discursive silence as it relates, first, to survivors and second, to the legal institutions that reinforce rules and categories that determine which forms of truth, or knowledge, around sexual violence are deemed legitimate, and which are not.

In the next section, we elaborate on the theoretical underpinnings of our argument with a brief review of the multidisciplinary literature, including scholarship from psychology, sociology, anthropology, political science, socio-legal studies, and feminist legal scholarship, that informs the study of silence as a response to violence, oppression, injustice, and deprivation. Subsequent sections explore the silences of law in respect to sexual violence in global society through an examination of two cases: a) Title IX as a mechanism for responding to sexual violence on college campuses in the United States; and b) the South African Truth and Reconciliation Commission’s efforts to pursue transitional justice vis-à-vis gender and sexual violence in post-apartheid South Africa. Our methodological choice to investigate two dramatically different cases reveals similar dynamics involving discursive silence as a response to sexual violence that are fundamentally rooted in pervasive gender inequities across the globe.

Within each of these general cases, we include focused case studies of individual women whose actions demonstrate the potential power of discursive silence as a tool for combatting sexual violence and injustice. Within the case study of Title IX, we consider the story of Emma Sulkowicz, who protested the outcome of a Title IX investigation at Columbia University related to her sexual assault complaint against a fellow student. Following the finding that her alleged assailant was not responsible, Sulkowicz responded by carrying a 50-pound mattress wherever she went on campus for the entirety of an academic year. Within the case study of the South African Truth and Reconciliation Commission, we describe the silence of Phila Ndwanne, an ANC militant, who remained silent when she was in detention prior to her execution, even though she was tortured by police officers trying to get her to inform on her comrades. Although both Sulkowicz and Ndwanne also spoke out publicly against violence and injustice, their silent protests represented their most memorable and powerful forms of resistance.

In our examination of Title IX and the TRC, we explore both personal and political rationalities that may underpin the production of discursive silence. Additionally, we trace the threads of these rationalities into individual experiences of sexual violence and the legal frameworks in which these experiences are given or refused recognition. Heeding Foucault’s call to move away from a-historicity, we centre our analysis around two historic periods in the last century: the movement for women’s rights in the United States in the 21st century and the struggle against Apartheid regime in South Africa. In doing so, we consider the social, political and juridical legacies of these histories in contemporary forms of silence around sexual violence and injustice.

Silence and the Limitations of Law Governing Sexual Violence

An examination of silence as a form of discourse offers insight into crucial truths about sexual violence that are not expressed, and may even be obfuscated, by the spoken and written language that purportedly provides an empirical account of cases involving sexual violence, including court proceedings, sealed investigation records, truth commission reports, media accounts, and public statements. Thus, global efforts to pursue justice for survivors of sexual violence must pay careful attention to the silences of the law and should be based on a recognition that justice may be located, at least in part, outside of positivist legal frameworks.

Silence is a pervasive and, indeed, normal human response to many forms of violence and injustice in global society. Judith Herman, a clinical psychiatrist with expertise on trauma, notes, “The ordinary response to atrocities is to banish them from consciousness. Certain violations of the social compact are too terrible to utter aloud: this is the meaning of the word *unspeakable*”.⁸ The psychological mechanisms that lead individuals to remain silent in response to trauma also have collective dimensions. It is not only trauma survivors who remain silent. Witnesses and bystanders with knowledge of violence and injustice may remain silent due to a variety of social pressures, cultural norms, and political constraints, including reluctance to speak about cultural taboos, tactful avoidance of uncomfortable or embarrassing subjects, pressures to protect members of one’s own cultural and social group, professional incentives, political expediency, and risk avoidance. Patterns of silence are social as well as individual.⁹ According to Hannah Arendt, social contexts structure dominant discourses around what may be spoken about publicly. Silences often reflect perspectives and experiences that diverge from the dominant discourses prevailing in specific political settings and social contexts. Despite the fact that they are not articulated publicly, these silences have meaning and reflect experiences that matter.¹⁰

When considering silence as a form of discourse, a critical challenge is uncovering the meanings of silence in the absence of spoken or written language. Elisabeth Porter’s typology of silence points to a potential path for discerning silence’s meaning in specific social, political, and historical contexts. According to Porter, silence may be a response to oppression, subjugation, domination or shame; an empowering mechanism for retaining self-respect; a pragmatic strategy for survival; or an act of agency.¹¹ As Porter’s typology suggests, silence may have positive as well as negative

⁸ Judith Lewis Herman, *Trauma and Recovery* (New York: Basic Books, 1992), p. 1.

⁹ Eviatar Zerubavel, *The Elephant in the Room: Silence and Denial in Everyday Life* (Oxford: Oxford University Press, 2006), pp. 3-5; pp. 23-32; pp. 34-39.

¹⁰ Hannah Arendt, *The Origins of Totalitarianism* (New York: Harcourt Brace, 1952), pp. 51-52.

¹¹ Elisabeth Porter, “Gendered Narratives: Stories and Silences in Transitional Justice,” *Human Rights Review* 17 (2016), pp. 36, 42.

motivations and can represent a compelling response to violence and injustice. In cases where survivors of violence embrace silence as a form of empowerment, as a survival strategy, or as agency, the breaking of silence has the potential to cause significant harm. A recognition of silence's different motivations signals that careful attention to the contexts in which it manifests may help reveal its meanings.

Motivations towards silence are particularly likely in contexts in which people have experienced oppression, violence, injustice, or pervasive inequities. In such settings, a presumption that silence conveys meaning should lead observers to pay attention to subtle forms of non-verbal communication. According to Carol Kidron, an ethnographic approach to silence requires paying careful attention to embodied practices, person-object interactions, and person-person interactions among survivors of traumatic violence and genocide that may reveal meaning in the absence of spoken or written language.¹² Examples of the embodied practices and interactions that Kidron encountered in her work with Holocaust survivors and their children include bodily scars, mementos or artifacts from historic sites of trauma, persistent nightmares, sleeplessness, frequent weeping without explanation, compulsions to finish all of the food on one's plate, and rituals designed to prepare against unexpected dangers or deprivations.¹³ In her work with survivors, Kidron encountered a pervasive pattern of silence among survivors and persistent reports by survivors' descendants that their parents did not speak about their past. Yet, despite this silence, the children of survivors consistently reported that their parents' Holocaust trauma was a presence in their home. The children of survivors *knew* even if their parents didn't *speak*. In this discovery, Kidron reports discovering a new category of knowing, "... a knowing without words, narrative, or history, a knowing through the body that wakes up at night, night after night, through the habitual taken-for-granted practice of covering one's head with a pillow and waking up one's father; all silent practices and tacit knowing."¹⁴

Gender norms that create stigma for survivors of sexual violence amplify the psychological and social factors that undergird an impulse to individual, familial, and collective silence in the face of trauma. Constructions of femininity that prioritize female sexual purity and modesty contribute to feelings of shame that make survivors reluctant to speak publicly about sexual violence that has been committed against them. Likewise, constructions of masculinity that emphasize male dominance and invulnerability make men resistant to publicly acknowledge when they have been victims of sexual violence. Thus, gender norms reinforce the psychological and social impulses to remain silent as a

¹² Carol A. Kidron, "Towards an Ethnography of Silence: The Lived Presence of the Past in the Everyday Life of Holocaust Trauma Survivors and Their Descendants in Israel." *Current Anthropology* (2009): 50 (1), p. 5.

¹³ *Ibid*, pp. 9-16.

¹⁴ *Ibid.*, p. 6.

response to trauma. Together, these individual and socio-cultural forces serve as a powerful barrier to the public acknowledgement of sexual violence.¹⁵

Marianne Constable's work on silence and the limits and possibilities of modern law sheds light on the multidimensional role of silence in policy arenas related to violence and injustice.¹⁶ According to Constable, "law is a place of encounters between persons and things, in silence and speech."¹⁷ Silence—the literal absence of voice—is often equated with an absence of power as well as an absence of justice. In this regard, "silences of the law" are often presumed to indicate sites of oppression and disempowerment. Instead, Constable's analysis suggests that the silences of law may point "...toward the possibilities of justice that lie in silence."¹⁸ Constable challenges positivist approaches that focus on formal, textual, articulated law while ignoring truths that may be garnered from law's silences. According to Constable, "The silences in the texts of law today are far from empty. They speak not only of limits, but also of possibilities, of justice in the contemporary law associated with actual empirical and social reality."¹⁹

Constable's work contests the emphasis on legal texts in socio-legal scholarship as well as the positivist jurisprudence of the liberal state. Prevailing socio-legal understandings of the law recognize the discursive power of language, as either control or empowerment.²⁰ In a framework that associates control and power with language, silence can be seen solely as a sign of disempowerment: "Subjects' silence in the face of powerful (or obfuscating) legal texts or silence in the face of a powerful and discursive law indicates the absence of power. Absence of words—the absence of stories and voice, the absence of history as articulation of a past, the absence of a tradition that knows itself—constitutes absence of power."²¹ Likewise, liberal political theory focuses on the connections between language and power by emphasizing public speech as a defining act of citizenship.²² If public voice is seen as a central manifestation of power, then silence is traditionally viewed as the opposite. "Within the current democratic politics of voice, however, silence is almost always taken up as an absence of power, as an issue to be raised on behalf of the less powerful to contest their marginalization, exclusion, or domination. Silence in this context marks those who have not been

¹⁵ Debra L. DeLaet, "Gender, Sexual Violence and Justice in War-torn Societies," *Global Change, Peace & Security* 20: 3 (2008), pp. 323-338.

¹⁶ Marianne Constable, *Just Silences: The Limits and Possibilities of Modern Law* (Princeton and Oxford: Princeton University Press, 2005), pp 331-34.

¹⁷ *Ibid.*, p. 6.

¹⁸ *Ibid.*, p. 8

¹⁹ *Ibid.*, p. 11.

²⁰ *Ibid.*, p. 45.

²¹ *Ibid.*, p. 55.

²² *Ibid.*, pp. 56-57.

properly heard, who are not listened to, or who have yet to come into their own voices.”²³

Challenging this view, Constable examines the insights that might be generated from spaces where the law remains silent.²⁴ Linguists and scholars of communication stress that silence is an important part of communication systems.²⁵ Recognizing silence as a critical form of communication, Constable echoes James C. Scott’s insight that silence represents a form of speech that can be used to resist dominant groups.²⁶ This insight further reflects a well-known conceptualization of silence as speech articulated by William Samarin, who compared silence within speech to the role of zero within mathematics.²⁷ Silence can convey significant meaning, just as the number zero plays a critical role in mathematics. Constable explores a range of U.S. cases, including legal norms governing tribal law, flag-burning, and the Miranda warning. In each case, Constable underscores that silence does not necessarily express powerlessness. Instead, silence expresses a range of complicated emotions, interests, and potentially strategic responses to injustice. Her analysis suggests that scholars and practitioners committed to rectifying injustice must learn how to recognize, read, and interpret the silences of the law. Protests against injustice can be found not only in the collective voice of social movements or public advocacy but also in personal and public silences.

Feminist legal scholarship sheds further light on the limitations of formal law, at both the national and international level, as a mechanism for responding to sexual violence. Positivist legal frameworks codify norms that may or may not be translated into concrete, enforceable policies. In the case of gender equality and sexual violence, women’s rights have been firmly codified in international human rights law. However, there is an enormous gap between the articulation of these legal norms and the state of women’s rights across the globe.²⁸ Due to this gap, feminist legal scholarship is sometimes characterized by a seemingly paradoxical skepticism about the ultimate value of the law as a mechanism for political and social change. Instead, a critical feminist perspective urges legal scholars to carefully examine “discourses located outside of law”.²⁹

²³ *Ibid.*, p. 59.

²⁴ *Ibid.*, p. 72.

²⁵ Zerubavel, pp. 8-9; Adam Jaworski, *The Power of Silence: Social and Pragmatic Perspectives* (Newbury Park, CA: Sage, 1993); Bernard P. Dauenhauer, *Silence: The Phenomenon and its Ontological Significance* (Bloomington: Indiana University Press 1980).

²⁶ James C. Scott, *Domination and the Arts of Resistance: Hidden Transcripts* (New Haven: Yale University Press, 1990).

²⁷ William Samarin, “The Language of Silence,” *Practical Anthropology*, 12 (1965), p. 115.

²⁸ Sally Engle Merry, *Gender Violence: a Cultural Perspective* (Wiley-Blackwell, 2009), p. 21.

²⁹ Martha A. Fineman and Nancy Thomadsen, eds. *At the boundaries of law: feminism and legal theory*. (London and New York: Routledge, 1991), p. xv.

To Report or Not to Report: That is the Question

"I don't know why it's so hard to believe women. You go to Saudi Arabia, you need two women to testify against a man. Here you need twenty-five." Jay Leno, joking in response to revelations about sexual assault charges against Bill Cosby. Cited in Rebecca Solnit, "The Short Happy History of the Rape Joke" in *The Mother of All Questions* (Chicago: Haymarket Books, 2017).

In countries and cultures across the globe, a legacy of silence exists around sexual violence. Powerful cultural norms that stigmatize victims of sexual violence coupled with adversarial legal processes that can re-traumatize victims while failing to provide redress or justice incentivize silence among survivors. This section explores forms of discursive silence that circulate around the legal mechanisms for responding to sexual violence on college campuses in the United States, specifically through the Title IX amendments to the 1964 Civil Rights Act. This legislation sought to integrate women's equality into the civil rights movement in the United States. Whereas Title IX processes for responding to sexual violence on campus have been ostensibly designed to provide redress to survivors, the case illustrates the ways in which formal laws governing sexual violence may reproduce legal logics that reinforce rather than challenge gendered social orders and patterns of violence.

Title IX and Responding to Sexual Violence on Campus

A significant body of scholarly work documents the high risk of sexual violence on college campuses in the United States, though estimates of the rates of sexual violence vary depending on the methodologies used.³⁰ At the same time, this scholarship indicates low reporting rates, estimated at approximately five percent, among individuals who say they have experienced sexual assault or misconduct.³¹ This gap between prevalence and reporting represents a critical silence in the legal logics governing sexual assault at institutions of higher education in the United States.

³⁰ Katrina Baum and Patsy A. Klaus, *Violent victimization of college students, 1995–2002* (Washington, DC: U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, 2005); Patricia Frazier, Samantha Anders, Sulani Perera, Patricia Tomich, Howard Tennen, Crystal Park, and Ty Tashiro. "Traumatic events among undergraduate students: Prevalence and associated symptoms." *Journal of Counseling Psychology*, 56: 3 (2009), pp. 450–460; Gail McCallion and Jody Feder, "Sexual Violence at Institutions of Higher Education," in Michael P. Watts, ed. *Sexual Violence on Campus: Overview, Actions, and Issues* (New York: Nova Science Publishers, 2015): pp. 4-6; pp. 237-244.

³¹ Nancy Chi Cantalupo, "Title IX's Civil Rights Approach and the Criminal Justice System," in Sara Carrigan Wooten and Roland W. Mitchell, eds. *The Crisis of Campus Sexual Violence: Critical Perspectives on Prevention and Response* (New York and London: Routledge, 2016), 129-133; Richards et. al. p. 105.

Title IX, a portion of the 1972 Amendments to the 1964 Civil Rights Act, prohibits gender discrimination in public education and in private educational institutions that receive federal assistance.³² Title IX serves as the legal foundation for national policies that require institutions of higher education in the United States to adopt detailed procedures for receiving and responding to complaints of sexual misconduct, including sexual harassment, sexual assault, and other forms of sexual violence.³³

The development of Title IX guidelines regulating responses to sexual violence at institutions of higher education was particularly robust under the Obama Administration. In 2011, the Office of Civil Rights (OCR) issued guidance that characterized sexual assault as a civil rights issue, articulated heightened standards for responding promptly and equitably to reports of sexual violence on campus, and called for institutions of higher education to create or formalize processes for responding to complaints of sexual assault or misconduct. Although these guidelines were intended to enhance the civil rights of women at institutions of higher education, the development of Title IX policy has not fundamentally disrupted the legal logics that produce patterns of silence among survivors of sexual violence on college campuses in the United States.

The OCR's establishment of an evidentiary standard calling for Title IX cases to be decided based on a preponderance of the evidence is illustrative. Advocates for survivors favor this standard because they believe it helps to overcome societal gender biases that attach stigma to victims of sexual violence which, in turn, make them reluctant to report sexual misconduct and violence. Because sexual assault and misconduct often do not have witnesses, cases typically involve contested accounts of an event in question. Judgements often turn on which person—the complainant or the accused—is believed. The beyond a reasonable doubt standard used in U.S. criminal cases (and the incredibly high stakes involved) reinforces the adversarial nature of trials as lawyers for the accused go to great lengths to raise doubts about the charges against their clients. Efforts to uncover evidence that might raise reasonable doubts exacerbate social tendencies to blame and shame victims by focusing on their behavior (what they were wearing or whether or not they had been drinking at the time of their assault) rather than on the behavior of alleged perpetrators. When victims of sexual violence report complaints, they can expect their sexual histories to be put under the microscope under cross-examination in adversarial processes. These dynamics commonly make survivors reluctant to report sexual violence because they do not believe they will be able to attain justice via institutional processes. A preponderance of the evidence

³² U.S. Department of Education, Office for Civil Rights, *Title IX and Sex Discrimination*. Available online at: https://www2.ed.gov/about/offices/list/ocr/docs/tix_dis.html.

³³ McCallion and Feder, pp. 15-16.

standard is intended to mitigate these dynamics by making it easier to prove the complaints of survivors.³⁴

Although limited data on Title IX enforcement exists, the Department of Education reported an increase in Title IX complaints and investigations subsequent to the 2011 guidance, a sign that the Obama Administration's efforts to overcome barriers to the reporting of sexual violence were at least partially successful.³⁵ However, the Obama Administration's Title IX guidance coupled with increasingly assertive and vocal complaints by activist groups representing women and survivors of sexual violence set the stage for cultural and political backlash. Many young men who have been accused of sexual assault assert that they are victims of false accusations. When they have been held responsible by campus investigatory bodies, they often view these processes as biased. In particular, accused men have argued that the preponderance of the evidence standard diminishes their procedural rights.³⁶

The backlash against Title IX has contributed to the Trump Administration's decision to shift its approach to oversight and implementation. In September 2017, the U.S. Department of Education rescinded the Obama Administration's 2011 guidance. Under the Trump Administration's new guidance, colleges and universities may elect to use the clear and convincing evidence standard, which sets a higher bar for determining responsibility, instead of the preponderance of the evidence standard. Given the risks already involved in reporting complaints of sexual violence and misconduct, survivor advocate groups fear that these changes will make it less likely that victims will be willing to come forward and report complaints. Many colleges and universities have expressed their intention to continue to follow the 2011 guidance, and some states, including California, have already codified provisions set by the Obama Administration to govern the implementation of Title IX. The interim guidance issued by the Trump Administration allows universities to continue to use the preponderance of the evidence standard in its Title IX processes. However, the Trump Administration is working on new guidelines that further reduce previous commitments intended to provide support to survivors in favor of procedural guidelines designed to protect the rights of the accused.³⁷

In this climate, survivors of sexual violence remain reluctant to participate in Title IX processes even when institutions have maintained evidentiary standards for deciding cases are more favorable to victims. A preponderance of the evidence standard does not override the obstacle to documenting sexual assault or misconduct when there

³⁴ Cantalupo, pp. 128-139; McCallion and Feder, pp. 18-25.

³⁵ McCallion and Feder, p. 17.

³⁶ Vanessa Grigoriadis, *Blurred Lines: Rethinking Sex, Power, & Consent on Campus* (Boston/ New York: Houghton Mifflin Harcourt, 2017), pp. 128-145.

³⁷ Sarah Brown, "What does the end of Obama's Title IX Guidance Mean for Colleges?" *The Chronicle of Higher Education* September 22, 2017.

are not witnesses and when alleged perpetrators offer alternative accounts of what happened. Likewise, a preponderance of the evidence standard does not necessarily mitigate the potential for adversarial approaches to Title IX processes; alleged perpetrators still challenge the veracity of the charges against them and frequently blame and shame their accusers in the process. As a result, survivors commonly remain reluctant to report sexual violence and to pursue justice via institutional processes even when policy changes purportedly intended to advance women's rights have been adopted. The legal logics that produce patterns of silence in response to sexual violence are deeply embedded in socio-cultural structures and norms, and changes to formal law are insufficient to disrupt these patterns.

Consent and the Silences of the Law

Much of the political disagreement about the proper scope of Title IX enforcement and the evidentiary standards that should be used in cases involving charges of sexual violence on campus stems from prevailing silences in the law on the meaning of consent. Under federal law, consent refers to freely given agreement to the conduct at issue by a competent person. Despite the relative simplicity in this definition, state statutes delineating the meaning of consent and criteria for determining when it has been given in sexual contexts vary dramatically.³⁸ Likewise, definitions of consent at institutions of higher education are divergent.³⁹ In this legal vacuum, cultural debates over the meaning of consent continue to evolve.⁴⁰ Importantly, the legal logic of the law's silence on the meaning of consent is a primary factor contributing to the pattern of survivor silence as a response to sexual violence.

In the 1990s, efforts to combat sexual assault on campus emphasized clearly articulated dissent to determine whether or not a person had given consent to a sexual interaction. The phrase that emerged to reflect a person's right to say no to sex was simple and clear cut: no means no! At one level, this requirement for articulated dissent could be seen as a vehicle for empowering individuals through language. A person has a right to say no to sex. When a person says no, the meaning of that articulated dissent should be taken at face value. It doesn't matter what a person is wearing. It doesn't matter if they have been drinking. It doesn't matter how many sexual partners they have had. It doesn't matter if they are dating or married to the person to whom they are saying no or if they have previously had a sexual encounter with that person. It doesn't matter when they say no. If at any point during an encounter a person says no, that person has not consented to sexual interactions beyond the moment they say no.

³⁸ John F. Decker and Peter G. Baroni, "'No' Still Means 'Yes': the Failure of the 'Non-Consent' Reform Movement in American Rape and Sexual Assault Law," *Journal of Criminal Law and Criminology* 101: 4 (2011), pp. 1083-1096.

³⁹ Aya Gruber, "Consent Confusion," *Cardozo Law Review* 3: 2 (2016), pp. 417-418.

⁴⁰ *Ibid.*, pp. 420-424.

The misogynistic retort, “No means yes!”, that some men have used to undercut efforts to fight sexual assault on campus inadvertently reveals that “no means no” discourse has been perceived as an assertion of women’s autonomy.⁴¹ Yet, the “no means no” standard is limited as a vehicle for protecting women’s sexual agency. Articulated dissent clearly indicates that a person has not consented to sex. However, relying strictly on this standard implies that silence constitutes consent. In the absence of a clearly articulated dissent, sexual interactions may be presumed to be consensual. This standard places the burden for stopping unwanted sex on the person who does not want it, a problematic burden given that situations in which sex is unwanted often involve power imbalances that make it difficult for the person who does not want sex to speak out or resist.⁴² No means no, to be sure. However, silence does not necessarily mean yes.

In the place of “no means no”, affirmative consent has emerged as a new standard for assuring that sex is consensual: yes means yes. Under this standard, a verbal “yes” or some other unequivocally clear articulation of assent is necessary for sex to be consensual. This standard has the potential to clear up much of the legal ambiguity that arises in cases involving charges of sexual assault on college campuses, especially cases in which a victim is incapacitated. Many Title IX cases involve drinking and intoxication. The affirmative consent standard makes clear that incapacitated individuals are incapable of giving consent. The affirmative consent standard also helps to address gendered power imbalances that make it difficult for women, in particular, to say no to unwanted sex.⁴³ Despite its potential for filling in gaps in the law’s silence around issues of consent, affirmative consent is an inchoate standard that has been codified only in a handful of states, including the District of Columbia, Minnesota, New Jersey, Washington, and Wisconsin. Further, it has been inconsistently incorporated into the Title IX policies and procedures of colleges and universities in the United States, though a recent study found that a majority of U.S. institutions of higher education define consent consistently with an affirmative consent standard.⁴⁴ Under the emergent Title IX guidance of the Trump Administration, it is not likely that affirmative consent will be a policy priority.

In addition to political obstacles preventing its widespread adoption, the legal logics of affirmative consent also limit its ability to rectify the limitations of the law around sexual violence. The standard of affirmative consent does not resolve all of the

⁴¹ Decker and Baroni, pp. 1081-82.

⁴² Leila Whitley and Tiffany Page, “Sexism at the Centre: Locating the Problem of Sexual Harassment,” *New Formations*, DI: 10.3898/NEWF.86.02.2015, pp. 41, 50-52.

⁴³ Richards et. al., pp. 110-111; Jeremy E. Uecker and Brandon C. Martinez, “When and Why Women Regret Sex in Hookups More than Men Do: An Analysis of the Online College Social Life Survey,” *The Sociological Quarterly* 58: 3 (2017), pp. 471-75.

⁴⁴ Richards et. al., p. 108.

tensions involved in debates over how to respond to sexual violence on college campuses in ways that appropriately balance the pursuit of justice for victims of sexual assault and the procedural rights of the accused. The affirmative consent standard cannot resolve cases in which the accuser and the accused offer divergent accounts of the facts in the absence of witnesses or material evidence. In cases involving alcohol-induced incapacitation, accused men and their defenders have argued that they should not be held accountable if they, too, were incapacitated. Furthermore, the concept of affirmative consent may not go far enough in challenging gender inequitable power structures around the issue of sexual violence. Wendy Brown's argument about the subordinating function of consent as a measure of whether or not a sexual interaction constitutes rape is instructive:

"... if the measure of rape is not whether a woman sought or desired sex but whether she acceded to it or refused it when it was pressed upon her, then consent operates both as a sign of subordination and a means of its legitimation. Consent is thus a response to power—it adds or withdraws legitimacy—but is not a mode of enacting or sharing in power. Moreover, since consent is obtained or registered rather than enacted, consent is always mediated by authority—whether in a second or third person—and is thus both constitutive of that authority and legitimated by it."⁴⁵

Applied to an analysis of Title IX, Brown's insight is illuminating. Even a conception of affirmative consent does not adequately challenge gendered political and social orders rooted in inequity. No means no. But yes may *not* mean yes in contexts when power inequities may lead women to feel pressured to say yes rather than self-determining their sexual lives from the starting point of their own internal needs and desires.

Mattress Performance and Breaking the Silence

...for it is the fate of a woman.

Long to be patient and silent, to wait like a ghost that is speechless

Till some questioning voice dissolves the spell of its silence

Henry Wadsworth Longfellow

During the 2014-15 academic year, Emma Sulkowicz, then a student at Columbia University, carried a 50-pound mattress wherever she went on campus for the entirety of the academic year. She carried this mattress as a work of performance art, titled *Mattress Performance (Carry That Weight)*, that she completed as her senior thesis in visual arts in protest of the university's finding that another Columbia student was not responsible for a sexual assault she alleged he committed against her. She had made a

⁴⁵ Wendy Brown, *States of Injury: Power and Freedom in Late Modernity* (Princeton: Princeton University Press, 1995), p. 163.

complaint of sexual assault against Paul Nungesser, who she said raped her in 2012 in her dorm room on a mattress like the one she carried. Ms. Sulkowicz alleged that Mr. Nungesser anally raped her after they had consensual vaginal intercourse. Mr. Nungesser insisted that the anal sex was consensual. Two other students had also brought complaints of sexual misconduct against Mr. Nungesser. In 2013, the disciplinary panel that investigated the case had found the accused student not responsible in the case involving Ms. Sulkowicz as well as in the cases brought by other students.

In articulating the rules for her performance piece, Ms. Sulkowicz indicated that she would carry the mattress for the remainder of her time at Columbia unless Mr. Nungesser was expelled or left the university. Because the student was not found responsible, Ms. Sulkowicz followed through with her *Mattress Performance*, a form of symbolic protest. In response, Mr. Nungesser filed a lawsuit against the university and a number of university officials, including President Lee Bollinger and Ms. Sulkowicz' thesis advisor, in which he alleged that *Mattress Performance*, a credit-bearing course, was a form of gender-based harassment and constituted defamation. Mr. Nungesser's initial lawsuit was dismissed, but he filed an amended complaint in 2016. Columbia University recently settled this complaint for undisclosed terms.⁴⁶

Emma Sulkowicz' *Mattress Performance* illuminates the ways in which the legal logics of consent help perpetuate patterns of silence as a response to sexual violence, particularly in the case of Title IX processes on college campuses in the United States. The divergent accounts of Ms. Sulkowicz and Mr. Nungesser hinged on the meaning of consent. The silence of the law on this point rendered Title IX's investigatory process inadequate to settle this question. Although the disciplinary panel found that Mr. Nungesser was not responsible, its finding did not indicate that the sexual encounter was necessarily consensual. It simply did not have sufficient evidence to find responsibility. The law remains silent on the meaning of consent, and such investigatory bodies remain limited in their ability to reveal definitive truths about unwanted sexual encounters. This case illustrates the general limitations of relying on adversarial legal approaches, drawn from criminal law, to resolve sexual assault complaints on college campuses.⁴⁷

Mattress Performance also offers a striking counterpoint to the prevalent reluctance of survivors to speak publicly about their experiences. Existing data on sexual violence at institutions of higher education in the United States suggests that most individuals do not report their experiences.⁴⁸ The fierceness with which Ms. Sulkowicz

⁴⁶ Kate Taylor, "Columbia Settles with Student Cast as a Rapist in Mattress Art Project," *The New York Times* July 14, 2017.

⁴⁷ Sarah Swan, "Between Title IX and the Criminal Law: Bringing Tort Law to the Campus Sexual Assault Debate," *University of Kansas Law Review* 64:4 (2016), p. 963.

⁴⁸ Cantalupo, 129-133; Richards et. al. p. 105.

protested the university's decision regarding her complaint conveys her conviction that her account about the sexual encounter with Mr. Nungesser represents the truth. It is difficult to believe that a young person would make such a demanding commitment for an extensive period of time without a sense of deep conviction. When juxtaposed against the gap between a high prevalence of experiences of sexual assault among women on college campuses and low levels of reporting, Ms. Sulkowicz appears to be an outlier. She engaged in a highly publicized symbolic protest.

In this regard, Ms. Sulkowicz' story is compelling not because it is representative of the responses of most survivors but because it illustrates the entrenched nature of the socio-cultural structures and norms that produce silence as a response to sexual violence. She initially sought redress through institutionalized Title IX processes, but the law's silence on the meaning of consent ultimately made this formal legal venue an unsuitable place for her to pursue justice. For most survivors, the law's silence on the meaning of consent prevents them from seeking justice via institutionalized legal processes to begin with. Rather than retreating to silence, Ms. Sulkowicz turned to symbolic protest to condemn publicly what she perceived as an unjust outcome of the Title IX process. In doing so, she pushed back against socio-cultural norms that produce silence among survivors.

Mattress Performance puts into sharp relief the silence of most survivors of sexual violence who remain silent because the formal venues for publicly speaking about such violence are unlikely to produce justice while at the same time exposing survivors to the risk of social shame, stigma, retaliation, and ongoing retraumatization. Most women who have experienced sexual assault or misconduct do not report it to Title IX bodies, let alone engage in public protest. However, the silence of most survivors does not mean that they do not hold the same deep convictions about the truth of their experiences as they understand them. The truths that live in the silence of quiet survivors may be just as compelling as the *Mattress Performance*.

In this way, *Mattress Performance* suggests that it is necessary to look beyond formal investigatory bodies in the search for the truth and in pursuit of justice for survivors of sexual violence on college campuses and beyond. For example, rather than conceiving of justice primarily in terms of punishment of perpetrators of sexual violence through formal legal institutions and processes, approaches that emphasize the healing of survivors may be more likely to empower and give agency to victims of sexual violence.⁴⁹ Furthermore, the limits of formal law as a mechanism for promoting justice for survivors of sexual violence suggest that it is essential to pursue initiatives that seek

⁴⁹ Debra DeLaet, Shannon Golden, and Veronical Laveta, "Beyond Retribution and Reconciliation: Therapeutic Justice for Survivors of Human Rights Violations and Wartime Violence," in Tiina Vaittinen and Catia Confortini, eds., *Gender, Global Health, and Violence: Feminist Perspectives on Peace and Disease*, Forthcoming.

to transform culture and to reduce the incidence of sexual violence rather than to rely on legal mechanisms for responding to sexual violence after the fact. Major efforts to expand socio-cultural understandings of consent and initiatives to educate young people about consent and healthy sexual relationships should be an essential part of global efforts to reduce the incidence of sexual violence and to pursue justice rooted in gender equity.

(Partial) Truth Commissions: When the Truth Remains Unspeakable

If any lesson emerges from the South African case, it is that silence has consequences. Tristan Anne Borer, "Gendered war and gendered peace: Truth commissions and postconflict gender violence: Lessons from South Africa," *Violence Against Women* 15.10 (2009), p. 1182.

Despite the establishment of international human rights instruments, like the United Nation's (UN) Security Council Resolution 1325 (2000) and UN General Assembly Resolution 49/205 of 2005 on sexual violence as a weapon of war, feminist legal scholars have questioned the ability of national and international legal frameworks to deliver justice for those affected by sexual violence during and after periods of conflict.⁵⁰ The sections that follow briefly trace the history of the South African Truth and Reconciliation Commission (TRC) and its mandate to 'unearth' accounts of gross human rights violations. Subsequent sections also explore forms of discursive silence that circulate around women's accounts of sexual violence across the apartheid and post-apartheid era.

The South African Truth and Reconciliation Commission (TRC)

In South Africa, silence around sexual violence is enfolded into the space between unutterable lived experiences and inadequate formal judicial mechanisms. In principle, Section Nine of South Africa's Constitution guarantees equality before the law and freedom from discrimination; in practice, however, these protections are not consistently implemented or made available through South Africa's judicial and law enforcement infrastructure. South Africa has one of the highest rates of sexual violence in the world.⁵¹ In a study conducted in the Western Cape Province of South Africa, 15% of the male participants said that they had committed rape, and 7% of the female participants reported that they had been raped at least once. In a 2010 study conducted in Gauteng Province, 37.4% of the male participants disclosed that they had raped a

⁵⁰ DeLaet; Borer.

⁵¹ Kate Joyner, "The Epidemic of Sexual Violence in South Africa," *SAMJ: The South African Medical Journal* 106: 11 (2016), p. 1067.

woman, and 6.9% disclosed that they had engaged in gang rape. Of the 37.4% of women who had been said they were raped in the 2010 Gauteng study, only 3.9% had reported it to the police. These recent studies reflect a prevailing silence among sexual violence survivors. Romi Sigsworth and Nahla Vahli⁵² and Pumla Gqola⁵³ have theorized this legacy of silence around sexual violence, tracing some of its roots back to the silences that surrounded women's accounts in South Africa's Truth and Reconciliation Commission (TRC). Capturing the disjuncture between progressive laws and prevailing silences, Gobodo-Madikizela, Fish and Shefer write that:

The coexistence of progressive protections of women's human rights enshrined in the South African Constitution and rampant violence against women in their homes and on the streets demonstrates the state's inability to fulfil its promise of providing safety and security for the most vulnerable communities. The failure of the state to provide physical security for all citizens is also a form of violence. The gendered dimensions of this failure suggest that the "new" governments, like their predecessors, continue to accord greater weight to the perpetuation of male power than to the provision of equal security.⁵⁴

In considering silence as a form of discourse, the remainder of this section explores the legal logics built into South Africa's TRC and suggests that these logics were generated by a particular social order that failed to recognise the gendered nature of conflict and its ramifications for women engaged in the struggle for freedom.

The TRC was set up under the National Unity and Reconciliation Act 34 of 1995 (referred to in this article as the Act) with a mandate "to establish as complete a picture as possible of the causes, nature and extent of the gross violations of human rights which were committed."⁵⁵ The Commission was also mandated (Section 3c of the Act) to restore dignity to those who had suffered by "granting them an opportunity to relate their own accounts of the violations of which they are the victims".⁵⁶ The extent to which the TRC achieved this mandate has been thoroughly challenged. A Foucauldian analysis of the TRC's discourse – beyond the language of the Act – points to the

⁵² Romi Sigsworth and Nahla Valji. "Continuities of violence against women and the limitations of transitional justice: The case of South Africa." *Gender in transitional justice*. Palgrave Macmillan, London, 2012, pp. 115-135.

⁵³ Pumla Dineo Gqola, "How the 'cult of femininity' and violent masculinities support endemic gender based violence in contemporary South Africa." *African Identities* 5.1 (2007), pp. 111-124.

⁵⁴ Pumla Gobodo-Madikizela, Jennifer Fish, and Tamara Shefer, "Gendered violence: Continuities and transformation in the aftermath of conflict in Africa," *Signs: Journal of Women in Culture and Society* 40.1 (2014), p. 92.

⁵⁵ South African Truth and Reconciliation Commission, Truth and Reconciliation Commission of South Africa Report (Cape Town, South Africa: 1998a) Vol. 1, p. 55.

⁵⁶ *Ibid.*

importance of historic contingency and the social order in which the Act was formed. The TRC came to life in a particular historic moment in a country still reeling from centuries of violence: for the majority of the population, pernicious structural and overt forms of violence were embodied, held in people's bodies and memories, visible in the grinding poverty that characterized their everyday lives. In this fragile democracy, scholars have argued that the 'reconciliation' component of the TRC was foregrounded with a view to achieving national unity and diminishing the potential for large-scale conflict.⁵⁷

In their analysis of the TRC's silence around race, Nahla Valji suggests that:

Whilst the feel good sentiment of the Mandela era's rainbow nation rhetoric may have been necessary in 1994, its entrenchment through the mechanisms of the TRC consolidated a reconciliation which has to date been more about accommodating former beneficiaries than redressing past injustices... In many ways the application of the thin bandage of rainbow nation reconciliation has merely allowed the wounds of the past to fester beneath the surface.⁵⁸

One of the most contested facets of the 'legal logic' underpinning the TRC, was its discursive construction of 'the victim' and of 'gross human rights violations'. Under the Act, victims were defined as those who had suffered a gross violation of human rights (GVHR). Defined in this way, victims were required to demonstrate that they had experienced GVHR in (at least) one of four ways: ill-treatment; abduction; torture; killing. Significantly, the Act made no reference to the gendered nature of human rights violations, nor did it mention women as a special target group. Sexual violence was only included as a subcategory in a very long list of potential harms rather than as being categorised as a separate violation.

This discursive construction of 'the victim' and the Acts' active marginalisation of sexual violence – placing it in a long list of potential harms rather – had consequences for the forms of violence that were revealed, and the forms of violence that were muted. Despite the political prominence and global visibility of the TRC, a majority of the victims of apartheid did not participate in TRC processes. In some cases, victim statements were not accepted because their experiences did not fall under the category of GVHR. Many victims remained reluctant to speak about their own suffering.⁵⁹ Although the majority

⁵⁷ Annelies Verdoolaage, "The Human Rights Violations Hearings of the South African TRC: a Bridget Between Individual Narratives of Suffering and a Contextualizing Masterstory of Reconciliation." (2002). [accessed March 2018]. Available from <http://africana.ugent.be/trc.htm>.

⁵⁸ N. Valji, N. "Race and reconciliation in a post-TRC South Africa," In *Ten Years of Democracy in Southern Africa Conference*, Southern African Research Centre, Queens University, Canada. (May 2004): n.p.

⁵⁹ Rita Kesserling, *Bodies of Truth: Law, Memory, and Emancipation in Post-Apartheid South Africa* (Stanford University Press, 2017), p. 24.

of apartheid's victims did not testify, the TRC helped generate a dominant discourse about victimhood in South Africa that minimized sexual violence.⁶⁰

In total, the TRC collected over 21,000 statements from victims who described 37,672 accounts of human rights violations. Of the over 21,000 statements, only 140 explicitly mentioned sexual violence.⁶¹ In the first five weeks of the hearings, 204 people testified in 160 cases of human rights violations. Of the 204 people, 58% were women. However, only 13% of the reported cases were directly concerned with violations perpetrated against women. In the remaining 87% of the cases, women spoke instead about the violations that had been committed against their fathers, brothers, husbands and sons.⁶² According to Fiona Ross, women may have felt more comfortable describing violations against the men in their lives than their own experiences of sexual violence because the latter invoked more shame.⁶³ When it became clear that women were not sharing their own experiences of gross human rights violations, gender activists lobbied the TRC to set up Special Women's Hearings. These hearings took place in Cape Town (1996), Johannesburg and Durban (1997); a fourth hearing was scheduled in the Eastern Cape, but this hearing failed to take place.⁶⁴

The TRC's construction of particular kinds of victims, and perpetrators, has been linked to the narrow range of accounts of violence that emerged through the hearings. Not only were many women constructed as 'secondary victims' who were there to speak of the violence that their husbands, brother and sons had suffered, but their own personal and political agency was muted. The forms of silence that emerged in the wake of the TRC hearings reflect the power of judicial institutions – like the TRC – to shape the kinds of stories that are told through words, and those that are told through silences. According to Goldblatt, "sexual violence would have been more centrally placed on the national agenda had it been mentioned in the founding legislation of the TRC".⁶⁵ The TRC's failure to provide sufficient time or judicial scope for women to recount their experiences of sexual violence led, too, to a very narrow range of recommendations at the end of the TRC process. In a 45-page chapter on recommendations, compiled by the TRC, there was only one mention of women.⁶⁶ Although women's accounts of sexual

⁶⁰ *Ibid.*, p. 2.

⁶¹ South African Truth and Reconciliation Commission, Truth and Reconciliation Commission of South Africa Report (Cape Town, South Africa: 1998b) Vol. 4, p. 296.

⁶² Fiona C. Ross, "On having voice and being heard: some after-effects of testifying before the South African Truth and Reconciliation Commission." *Anthropological Theory* 3.3 (2003), pp. 325-341.

⁶³ *Ibid.*

⁶⁴ Beth Goldblatt and Sheila Meintjes. "Dealing with the aftermath: sexual violence and the Truth and Reconciliation Commission." *Agenda* 13.36 (1998), p. 9.

⁶⁵ *Ibid.*, pp. 17-18.

⁶⁶ South African Truth and Reconciliation Commission, Truth and Reconciliation Commission of South Africa Report (Cape Town, South Africa: 1998c) Vol. 5, p. 305.

violence did emerge through the testimonies at the Special Women's Hearings, these accounts did not—in the end—fundamentally alter the TRC's relative silence around women's experiences of sexual violence: there were 100 recommendations to emerge from the TRC, but none of them mentioned the need to address the women's experiences of sexual violence and other human rights violations. The final seven volume TRC report acknowledges this silence:

The Commission's relative neglect of the effects of the "ordinary" workings of apartheid has a gender bias, as well as a racial one' and concedes that 'the definition of gross violation of human rights adopted by the Commission resulted in a blindness to the types of abuse predominantly experienced by women'⁶⁷

The above quote articulates the overarching nature of gender-blind 'legal logics' in which the definition of GVHR perpetuated silence around sexual violence, closing down rather than opening up the space in which women's experiences of gender violence could be heard.

In the section that follows, we consider some of the ramifications of the legal logics underpinning the TRC's silence around the gendered nature of human rights violations under apartheid, with a focus on sexual violence in particular.

Sexual Violence and the Women Who Remained Silent

I suggest that it is when the language of silence, which forms part of the 'economy of the invisible', is also uncovered that we have a better view of those privatized experiences of living daily in violent contexts. Chelsea Haith, "The Complexities of Silence in Buhle Ngaba's *The Girl Without a Sound* in the Context of Contemporary South African Tertiary Education Protest." *Current Writing: Text and Reception in Southern Africa* 29.2 (2017), pp. 111-120.

The legal logic of the TRC was based on the assumption that speaking before the TRC was a path towards healing and justice. In practice, this legal logic was operationalized through the presumption that victims were able and willing to provide public testimony before the TRC. In this way, speech constituted the basis of evidence in the TRC.⁶⁸ Conversely, the TRC did not consider the meanings of silence or the experiences of victims who remained voiceless in the proceedings. Further, as discussed above, the legal logics underpinning the TRC's definition of 'victim' and 'gross violations of human rights' (GVHR) reinforced the silence around women's experiences sexual violence during apartheid.

⁶⁷ South African Truth and Reconciliation Commission, Truth and Reconciliation Commission of South Africa Report (Cape Town, South Africa: 1998d) Vol. 4, p. 144.

⁶⁸ Kesserling, p. 86.

Returning to our conceptualization of silence, we suggest that it is not the null and void, but rather, a form of discourse. Similarly, and with reference to the TRC in particular, Pumla Gqola cautions against equating women's voice with women's dignity. She writes that "central to this space (the space that women occupy linguistically) is the creation of a new language,"⁶⁹ Writing on trauma, Eija Harjula and Timo Heiskanen similarly argue that trauma can generate a 'silent language' that occupies the space between words; in doing so, silence starts to rupture speech, changing its rhythm.⁷⁰ Drawing on and extending Gqola's analysis of the TRC, Motsemme articulates three forms of silence in women's engagement with the TRC.⁷¹ We discuss these elements of the 'language of silence' below.

First, silence can work as a form of resistance and courage.⁷² Many of the testimonies that emerged during the TRC revealed long-kept secrets, highlighting the role that silence played in resisting the apartheid government. This form of silence speaks to Foucault's observation that although "silence and secrecy are important shelters for power and a source for anchoring its prohibitions, they also have the capacity to loosen its hold, thus making it possible to thwart hegemonic power itself."⁷³ Referring to De Certeau's ethnographic research in Latin America, Motsemme describes how women strategically maneuvered through the constraining space of the TRC – including its narrow prescriptions of victimhood and violation.

The story of Phila Ndwandewe illustrates the discursive nature of silence as a form of resistance and courage. A member of of Umkhonto We Sizwe (MK), the military wing of the African National Congress (ANC), Phila Ndwandwe was captured by the apartheid security forces in November 1988. Through their testimonies at the TRC, the police officers described how they had kept her naked for ten days as they tortured her in an attempted to turn her against her comrades. In the last few days before she was killed, Ndwandwe had found a garbage bag and had fashioned a pair of pants to cover herself with. Artist, Judith Mason, constructed a blue dress using plastic rubbish bags to symbolise Ndwandwe's commitment to silence as a form of resistance. In the art work, called the *Woman Who Was Silent*, the blue dress moves up and out of the frame, away from a fire and a lurking predator. The dress is transcendent. Mason wrote to Phila on the blue plastic dress about the power of her silence as a form of transcendence – a way to win the struggle against flesh and blood brutality: "Sister, a plastic bag may not be the whole armour of God, but you were wrestling with flesh and blood, and against powers,

⁶⁹ Gqola, p. 20.

⁷⁰ Eija Harjula and Timo Heiskanen, "Trauma Lives in Speech: The Rhythm of Speech Breaks, Words Disappear, A Hole is Torn in Speech," *International Forum of Psychoanalysis* 11.3 (2002), pp. 198–201, 198.

⁷¹ Nthabiseng Motsemme, "The mute always speak: On women's silences at the Truth and Reconciliation Commission." *Current Sociology* 52.5 (2004), pp. 909-932.

⁷² *Ibid.*

⁷³ *Ibid.*, p. 917.

against the rulers of darkness, against spiritual wickedness in sordid places. Your weapons were your silence and a piece of rubbish..." Reflecting on Phila Ndwandwe's powerful silence, Gobodo-Madikizela, Shefer and Fish suggest that the ubiquitous presence of discarded plastic supermarket bags in 'post'-conflict countries across the African continent symbolize "the pervasive violence enacted on women's bodies, humiliated bodies, bodies that succumb to violence and those that withstand it, bodies targeted during wars and bodies targeted in peacetime."⁷⁴ While many women did not share their accounts of sexual violence through the TRC's hearings, or even through the Special Women's Hearings, there is value in listening to the silences alongside the spoken words, particularly in light of women's accounts of disruption to their political and domestic lives.⁷⁵

The second form of silence, according to Motsemme, is the illusion of stability. She suggests, for example, that by leaving some things unsaid, spoken narrative can play an important role in re-creating the 'normal': "[O]rdinary women's narratives of the past appeal that we actively acknowledge the agency they enact in their work of harnessing positive social and cultural meanings that are necessary for the delicate maintenance and repair of relationships across generations".⁷⁶ The ubiquity of sexual violence among women - before, during and after the TRC process - may account for their decision to focus on the internal spaces (in their minds, or within safe social and physical environments) that they were able to control. "[A]s much as silence may have become a way to communicate a shared experience of constant violence, it was also used as a tool to mark and alienate those who were perceived as dangerous to one's sense of safety."⁷⁷ In this way, silence can function as a form of protection from harmful and invasive scrutiny.

Writing about bell hooks's caution against simplistic accounts of black women as 'rocks',⁷⁸ an "earthy mother goddess who has built-in capacities to deal with all manner of hardships without breaking down, physically or mentally", Motsemme proposes a third form of silence as one that offers shelter: a site for coping and the reconstitution of self. The violation of women's homes and bodies during apartheid, left many women feeling like they had lost a sense of control over their lives, and their bodies.⁷⁹ Motsemme suggests that by moving into silence - as prayer for example - women were able to create a sanctuary in which they could start to heal and reclaim their sense of self:

⁷⁴ Gobodo-Madikizela, Shefer and Fish, p. 84.

⁷⁵ Ross; Motsemme.

⁷⁶ Motsemme, p. 920.

⁷⁷ *Ibid.*, p. 922.

⁷⁸ hooks, bell. *Sisters of the yam: Black women and self-recovery*. Boston: South End Press, 1993.

⁷⁹ Ross.

These moments of retreat into silence and prayer also then give us a glimpse into women's speeches of desire (Sitas, 2004) and betrayals of their full humanity under apartheid. This is because they tap primarily into factors beyond the present conditions of existence. Here we encounter an inner world governed by the imagination and a language that refuses to be confined to narrow racist and sexist forms of validation.⁸⁰

The silence surrounding sexual violence continues into South Africa's present, taking new shape and generating new forms of resistance. For example, in a bid to make sexual violence in South African universities – and South Africa as a whole - more visible, a group of activists set up the Silent Protest at Rhodes University in the early 2000s. This large-scale protest has grown over the last decade to take place at multiple universities around the country, with protesters standing in silence together – often with black tape over their mouths to denote the silence around their own and other people's experiences of sexual violence. In her discussion of these silent protests, Haith refers to the sense-making that has happened over the last two decades to understand the language of silence that flowed through women's testimonies, or decision to not testify, at the TRC. She suggests that, "Reinterpreting silence as another language through which women speak volumes, allows us to then explore other, perhaps hidden meanings regarding the struggle to live under apartheid."⁸¹ Looking across time, this case study suggests that the agency and the fragmentation that occurs through sexual violence can be both embodied and articulated through silence

Learning to Read and Speak Silence

"It is not actually possible to say anything, I occasionally notice. Words are general categories that lump together things that are dissimilar in ways that matter; blue is a thousand colors and horse is thoroughbreds and ponies and toys; love means everything and nothing; language is a series of generalizations that sketch out incomplete pictures when they convey anything at all. To use language is to enter into the territory of categories, which are as necessary as they are dangerous." Rebecca Solnit, "The Pigeonholes When the Doves Have Flown," in *The Mother of All Questions* (Chicago: Haymarket Books, 2017)

The case studies in this manuscript demonstrate the ways in which silence fundamentally shapes personal and public responses to sexual violence in global society. Both Title IX and the South African TRC reveal the institutional obstacles to achieving justice for survivors of sexual violence. As a mechanism for responding to sexual violence at institutions of higher education in the United States, Title IX represents a civil rights framework focused on gender equality that has been implemented in ways

⁸⁰ Motsemme, p. 924.

⁸¹ Haith, p. 910.

intended to reduce sexual assault and misconduct at U.S. colleges and universities. Yet, Title IX law remains silent in terms of articulating a clear and precise definition of consent, a silence that limits the effectiveness of Title IX processes. Moreover, even a well-articulated standard of affirmative consent does not go far enough in disrupting inequitable gendered political and social orders that produce patterns of sexual violence. The TRC failed to incorporate explicit language prioritizing gender-based violence, though it did include sexual violence as one among many sub-categories of harm that would be considered by the TRC. The TRC eventually instituted Special Women's Hearings. However, many women refrained from sharing their accounts of sexual violence through either the TRC's regular hearings or the Special Women's Hearings. Given the critical silences in the laws governing sexual violence in each of these cases, many survivors have resisted participating in these processes for a range of reasons, including a lack of trust that they are capable of producing justice. Thus, the silences of the law governing sexual violence produce silence among survivors that serves to perpetuate patterns of sexual violence across the globe.

This dilemma indicates that proponents of justice for survivors of sexual violence need to scrutinize the silences in the law as well as the silences of survivors. In studying sexual violence in global society, legal scholars and social scientists tend to rely on empirical, positivist methodologies. Legal positivism has a rational foundation, and it protects important values, including procedural rights for the accused. Similarly, social science methodologies are intended to produce objective, accurate information. However, the empiricism of legal positivism and social science methodologies can be inadequate to uncover truths that survivors are resistant to reveal. An emphasis on textual analyses and an on what is said—what can be said—in legal, institutionalized settings mistakes speaking for truth. In place of an exclusive emphasis on speech as the vehicle for pursuing truth and justice, approaches that emphasize embodied experiences and practices may help uncover the hidden meanings of silence. In turn, advocates for sexual violence survivors can build on expanded understanding of the truths surrounding sexual violence to identify alternative approaches to pursuing justice for survivors.

Silence as a form of discourse requires observers to integrate *seeing* with *listening*. We listen attentively to spoken language to comprehend meaning. We cannot listen in the same way to discursive silence. Instead, we must actively look for the hidden meanings in nonverbal cues, in bodily experiences and practices, and in symbolic or silent forms of protest and politics. In the context of gender and sexual violence, we may draw on Catherine MacKinnon's argument that gender equality requires making the law "gender sighted" rather than gender blind.⁸² We need to assertively interrogate

⁸² Catherine MacKinnon, *Toward a Feminist Theory of the State* (Cambridge, Harvard University Press, 1989), p. 238.

the contexts in which gender inequality manifests in order to be able to uncover the meanings of discursive silence.

Gender biases that prevail in societies across the globe make it more likely that men accused of sexual violence will be willing to speak publicly about allegations. Indeed, men who are guilty may be especially likely to speak publicly, in an effort to discredit women against whom they have committed sexual violence or to intimidate women who have reported them. Meanwhile, survivors may remain silent because they know they may not be believed. Survivors also understand that they might be shamed because of the stigma associated with sexual violence and might be publicly vilified for making allegations. Legal norms that provide procedural rights to accused persons are, no doubt, important to the rule of law. At the same time, these norms incentivize silence on the part of survivors who often calculate that the threshold of proof for sexual violence and misconduct is too high balanced against the costs of participating in adversarial legal processes or even in restorative justice processes because of the gender biases that shape the public dimension of these settings. In such cases, critical truths are often in the silence.

The limitations of institutionalized processes that emphasize public testimony as a mechanism for addressing sexual violence underscore the importance of learning to read the silences of the law. *Mattress Performance* and *The Woman Who Kept Silent*, the works of protest art that we profiled in our case studies of Title IX and the TRC, remind us of the power of the stories that silences can tell. The stories of Emma Sulkowicz and Phila Ndwande represent exceptional cases. Both women exhibited fierce public voices, Emma Sulkowicz in protesting Columbia University's decision in her sexual assault complaint and Phila Ndwande as an ANC militant. Yet, the most memorable and powerful parts of their stories are represented by the silent dimensions of their protests against injustice. The uniqueness of the symbolic politics in which each of these women engaged hints at a deep reservoir of stories submerged in the silence beneath the public surface of legal texts and public speech. Most survivors do not exhibit the persistence and public strength of Emma Sulkowicz or Phila Ndwande. That does not make the stories hidden in these silences any less important to an understanding of the truth about sexual violence in global society.

Once we acknowledge that truth and justice may be found in the silences of the law, we recognize the need to excavate these silences. Comprehensive strategies for how to best accomplish this goal go beyond the scope of this paper. Still, it is appropriate to set out the kinds of questions we might ask regarding sexual violence if we were to take silence seriously. What private suffering might the people whom we encounter in our daily lives have endured? Why might they be unwilling to speak about this suffering? What does their body language tell us about their hidden suffering? What does a faculty member know about her students' experiences with sexual assault and misconduct but is not at liberty to tell us? When men publicly disparage the reputations of women, what might their motivations be? What might they be trying to hide? What is

left out in accounts of wartime atrocities and human rights abuses because of gender biases that hinder speech about sexual violence? How can we overcome these dynamics while protecting the well-being and preferences of survivors?

As we contemplate the intersection of silence and sexual violence, it seems appropriate to close with the words of Sara Ahmed: “Even if speaking out is not possible, it is necessary. Silence about violence is violence. But feminist speech can take many forms. We become more inventive with forms the harder it is to get through. Speaking out and speaking with, sheltering those who speak; these acts of spreading the word, are world making. Killing joy is a world-making project. We make a world out of the shattered pieces even when we shatter the pieces or even when we are the shattered pieces.”

And now, we sit in silence.